No. 87-1507

(3)

In the Supreme Court of the United States

October Term, 1987

DAVID YASHON, M.D.,
Petitioner,

v.

WILLIAM E. HUNT, M.D., *et al.*,
Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

Petitioner's Statement of the Case significantly misstates the facts of this case as the record before the lower courts reveals. Petitioner is a doctor of medicine duly licensed to practice by the State of Ohio. Since September, 1969 and continuing till the present time petitioner has served as an associate professor in the Department of Surgery of the Ohio State University. From September, 1969 until September 1, 1981, petitioner also was a member of the medical staff of the Ohio State University Hospitals (hereinafter "University Hospitals").

Medical staff privileges at University Hospitals are valid for only one year. Each medical staff member is

required to annually submit an application for reappointment to the medical staff. The Medical Staff Administrative Committee (hereafter "MSAC"), which is the body charged with responsibility for judging the fitness of physicians to serve on staff, determines whether applications for reappointment should be approved.

In 1981, prior to the expiration of petitioner's annual staff privileges, Dr. Larry C. Carey, who was Chairman of the Department of Surgery and petitioner's superior, declined to recommend petitioner's reappointment to the medical staff. Thereafter, the MSAC met on June 10, 1981, and the Executive Committee met on June 17, 1981, to consider the annual reappointment of petitioner. Both committees declined to reappoint petitioner.

On July 15, 1981, petitioner filed the instant action to force the respondents to approve his application. On July 17, 1981, the parties agreed that the MSAC should conduct a review of petitioner's application in which presentations could be made concerning the reasons for not recommending petitioner's reappointment.The district court did not order that the MSAC conduct a "due process" hearing, but the court did suggest that Dr. Carey and the petitioner each make a presentation to the MSAC.

Petitioner subsequently received two written notices of the hearing. Accompanying one of the notices was a list of the specific reasons being advanced for not approving petitioner's application.

On September 1, 1981, the MSAC hearing was held. Dr. Carey gave an opening statement explaining that he was going to present witnesses and evidence showing why petitioner should not be reappointed to the medical staff. Petitioner also made an opening statement to the MSAC.

Petitioner did not ask for an opportunity to present any witnesses.

During the course of the hearing both Dr. Carey and petitioner presented documentary evidence in support of their respective positions. Petitioner, in fact, read at length from documents and circulated others. The documents submitted by Dr. Carey were of no surprise to petitioner because the same documents had been submitted in a prior disciplinary hearing.

Dr. Carey also presented thirteen witnesses at the hearing. Petitioner was afforded the opportunity to cross-examine each of those witnesses and he did in fact extensively question those witnesses. Moreover, in this relatively informal proceeding, the members of the MSAC asked questions of the witnesses.

During the hearing petitioner admitted the truth of four charges against him. No additional witnesses were needed on those charges. Moreover, on four other charges every available witness who could testify in fact did testify at the hearing. Finally, at no time during or since the hearing did petitioner ever identify a single witness whom he would have called at the hearing on any issue.

The entire proceeding was taken down by a court reporter. At the end of the proceeding, the members of the MSAC voted 13 to 4 to deny the petitioner's request for reappointment to medical staff privileges. Minutes of the hearing were prepared which showed that the MSAC rejected petitioner's request for reappointment.

During the course of the MSAC hearing, many reasons were discussed for denying petitioner's application, including the numerous disciplinary actions against him during the last few years he was on the medical staff. Petitioner's

brief is less than candid about those disciplinary actions, which were extensively discussed during portions of the MSAC hearing.

The MSAC discussed a May, 1978 action brought under the University's detenurization procedures because of petitioner's falsification of a research grant application. It is undisputed that petitioner did in fact falsify the application. The Dean of the College of Medicine concluded in that prior action that the charge was "serious" but that, *alone*, the falsification was not sufficient to justify *removal of tenure.*

In another disciplinary proceeding, a committee of four doctors reported on March 13, 1979 that petitioner's removal of a doctor's note from a patient's chart was "improper conduct." The same panel concluded that petitioner was derelict in his responsibilities to another patient and that he gave no adequate reason why he delayed in seeing this critically ill patient.

The next disciplinary action, instituted on October 27, 1979 by Dr. Larry C. Carey, is especially important, inasmuch as petitioner focuses in his petition on the discredited and overruled report of the "Grievance Committee," an intermediate reviewing body. In this disciplinary action, Dr. Carey requested *removal* in mid term (as opposed to non-renewal) of petitioner's staff privileges based on a number of specific incidents and petitioner's pattern of disruptive, uncooperative and unprofessional behavior.

The first body reviewing the charges, the Investigation Committee, found that the charges were "substantial" and that the incidents cited had disrupted medical care, administrative functions and resident education. The Committee

also opined "that the situation has been allowed to continue too long and that disciplinary action should be taken to prevent further disruption."

Thereafter, the Vice-Chairman of the Department of Surgery, conveyed the Investigation Committee's report to the Dean of the College of Medicine. The Vice-Chairman wrote:

> [The] pattern of unethical, unprofessional and self-serving behavior is so consistent and repetitive over a long period of time that the odds of these being isolated incidents or mere coincidence is almost infinitesimal. It seems quite clear that on several documented occasions, Dr. Yashon has been willing to manipulate a patient's status or situation, sometimes jeopardizing his safety or well being, in an attempt to gain leverage to his own purposes or convenience.

The matter was then referred to the "Grievance Committee" which issued a report on July 24, 1980. *That report was specifically overruled by the Associate Dean of the College of Medicine, who issued a strong reprimand to Petitioner on September 30, 1980.*[1] The Grievance Committee's report was overruled because the committee refused to provide the Associate Dean with the factual basis for its conclusory opinions, the report revealed an ignorance of key facts, and the Grievance Committee failed to interview

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[1] Dr. Tzagournis' letter of reprimand states in part:

> The preponderance of evidence indicates that your activities and professional conduct are considered to be disruptive to your clinical division and University Hospitals. Numerous incidents over several years caused considerable concern to members of the Medical Staff, the non-M.D. staff of University Hospitals, and the Administration. In fact, the training program in Neurosurgery was seriously jeopardized by some of these actions.

crucial witnesses, including many of the current and former residents in Neurosurgery. Many of these residents and former residents had asked to be removed from any association with petitioner because of serious concerns over the quality of his care of patients.

The Grievance Committee's report also misrepresented that the few residents it did interview had a favorable impression of petitioner. This conclusion ignored information from Dr. Richard Dewey, a former resident who was interviewed by the Grievance Committee. Dr. Dewey summarized the information he had given to the Grievance Committee in a letter which Dr. Carey read during the MSAC due process hearing:

> I feel that Dr. David Yashon is a detriment to the division of neurological surgery at the Ohio State University and to the university itself. Dr. Yashon did not appear to be interested in the teaching program, was not interested in the development of his residents or in the promotion of the specialty of neurological surgery, as I observed. He seemed far more interested in how many patients he had and how many operations he performed. * * *
>
> Dr. Yashon taught us a great deal about covering our flanks from a medical-legal standpoint but little about the techniques of neurosurgery and the social and intellectual skills required of a neurosurgeon in an extremely complex field.

As noted by the district court, the MSAC appropriately voiced concern at the September 1, 1981 hearing over the apparent lack of evidence and inaccurate reporting of evidence by the Grievance Committee.

Petitioner appealed the Associate Dean's reprimand to the Executive Committee. After a hearing on his appeal

commenced, petitioner learned that the Executive Committee would consider the matter *de novo* and could potentially remove petitioner from the medical staff. With that potential result, petitioner refused to proceed, withdrew his appeal and allowed the strong reprimand to stand.

Petitioner's continuing unprofessional conduct resulted in a fourth disciplinary proceeding in May 1980. Dr. Carey suspended petitioner's admission and operating room privileges for failing to respond appropriately to a specific request of a resident that petitioner come to the hospital and attend a patient. That suspension was lifted on June 26, 1980 by the Dean of the College of Medicine.

In addition to reviewing the prior disciplinary proceedings, the MSAC hearing also addressed a number of other reasons for the denial of petitioner's application. These included petitioner's negative and abusive behavior, which resulted in neurosurgical residents requesting not to work with him; his unauthorized removal of confidential records; additional examples of his failure to supervise residents; his verbal falsification to his superiors of operative surgery results; his improper admission of patients; and other unacceptable behavior as set forth in the notice of the hearing.

Petitioner has also been less than honest about his purported devotion to teaching. It is undisputed that he has not been a faculty member in the Neurosurgery Residency Training Program at the Ohio State University Hospitals since May 14, 1979. On that date, petitioner agreed to withdraw from the clinical teaching faculty in order to avoid an evidentiary hearing scheduled before an independent panel of neurosurgeons to consider his qualifications. Thus, since May 14, 1979, petitioner voluntarily has not

"taught" residents in his clinical practice. Petitioner has studiously avoided presenting this fact to this Court.

Denial of reappointment to medical staff privileges did *not* significantly affect petitioner's income or ability to practice medicine. In fact, approximately two-thirds of petitioner's medical practice as of September 1, 1981 was conducted at another hospital.

Additionally, denial of reappointment to the medical staff did not affect petitioner's tenure as a professor in the College of Medicine or his ability to do research in the laboratory as a professor. These facts, combined with the fact that petitioner has not taught residents since he withdrew from the faculty of the Residency Training Program in 1979, make it difficult to accept petitioner's statement that his paramount interest in being reappointed was to continue his chosen career as a professor of neurological surgery.

REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT

1. The Decision Below Followed This Court's Principles When It Reviewed The Parties' Interests To Determine What Process Was Due In This Case.

Even a cursory reading of the decision of the Sixth Circuit Court of Appeals reveals that the decision is not in conflict with the decisions of this Court on the due process issue. The court of appeals' decision scrupulously follows the due process analysis set forth by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and recognizes that "the overall concept of due process of law is a flexible one, and

therefore the type of procedural protections required in a particular situation depends largely upon the circumstances of that situation. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)." The court of appeals correctly recognized that it must balance the private interest at stake, the risk of an erroneous deprivation of such interest and the government's interest in order to determine the procedural protections required. The mere assertion by petitioner of conflict with Supreme Court precedent will not suffice to create such a conflict where none exists.[2]

The undisputed facts presented to the lower courts establish the limited nature of the petitioner's interests. While petitioner argues that he was denied the right to pursue his chosen career, the lower courts correctly determined that his interest was much more limited. First, petitioner as of September 1, 1981 conducted approximately two-thirds of his medical practice at another hospital. Thus, denial of reappointment to the staff of University Hospitals did not deprive petitioner of his livelihood or ability to practice medicine since he had staff privileges at more than one hospital.

Second, petitioner was seeking *renewal* of staff privileges and he knew that he was not guaranteed those staff privileges. *Nonrenewal* of annual staff privileges is distinguishable from a disciplinary revocation of privileges during the effective term of those privileges.

Third, denial of reappointment to the medical staff did not affect petitioner's tenure as a professor. The denial

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[2]Petitioner even "recognizes that the constitutional right to be heard in one's defense does not in all cases mandate a formal adjudicatory hearing in which the parties may call witnesses to testify." Petition, at 26-27.

also did not affect his ability to do research in the laboratory as a professor.

Finally, and perhaps most importantly for determining the scope of the interest asserted by petitioner, it is undisputed that petitioner had voluntarily withdrawn on May 14, 1979 from the faculty of the Residency Training Program and ceased teaching residents in the course of his clinical practice. Moreover, petitioner had not sought the privilege of teaching in the two years preceding the decision to not renew his staff privileges. Thus, the MSAC hearing at issue in this case had no impact on petitioner's interest in being a clinical professor of neurological surgery, since he had not taught residents since May 14, 1979.

The interests of University Hospitals on the other hand, were extremely important. In light of its responsibility to provide quality medical training and patient care, it sought to retain only competent and highly compatible physicians on its medical staff. The court of appeals recognized that University Hospitals had an important interest in quickly dealing with incompetence and debilitating frictions in order to ensure effective performance by physicians on the staff, whose tasks require a high degree of cooperation, concentration, creativity and the constant exercise of professional judgment.

The courts below properly weighed the interests of the parties when they determined whether the procedural protections accorded petitioner violated any federal rights and whether the MSAC was presented with substantial evidence to support its ultimate action.

2. Due Process Does Not Mandate That Applicant For Reappointment to a Medical Staff Be Permitted to Call Witnesses

Petitioner admits that no decision of this Court has ever held that an applicant for reappointment to a medical staff must be allowed to call witnesses. Petitioner argues, instead, that the decision below violates principles set forth in this Court's decisions reviewing due process requirements.

Petitioner relies upon five cases for his position that he had the right to call witnesses in this proceeding. The decision of the court of appeals below is not in conflict with any of those decisions. Three of the decisions can only be read to indicate that due process does *not* require that petitioner be permitted to call witnesses. The remaining cases deal with termination of liberty interests resulting in imprisonment and are thus, clearly distinguishable.

Petitioner's contention that the decision of the court of appeals is in conflict with *Goss v. Lopez*, 419 U.S. 565 (1975), is incorrect. This Court held in *Goss* that due process requires with the suspension of a student for disciplinary reasons "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581. All that *Goss* required was an informal give-and-take between the student and the administrative body that would, at least, give the student the opportunity to characterize his conduct and put it in what he deemed the proper context. *Goss* does not hold that due process mandates an opportunity to call witnesses. In fact, *Goss* supports the decision of the court of appeals, which recognized that petitioner was afforded a meaningful opportunity to be heard.

Likewise, *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), cannot possibly be read to support petitioner's position. This Court held in *McElroy* that the summary exclusion of a worker from the premises of a factory, without a hearing and without notice as to the specific grounds for the exclusion, did not violate due process. There is clearly no conflict between *McElroy* and the decision of the court of appeals in this case.

Goldberg v. Kelley, 397 U.S. 254 (1970), also does not support the petitioner's claim to a constitutional right to call witnesses. *Goldberg* was an "entitlement" case which involved the termination of public assistance to a welfare recipient, which provided the recipient with essential food, clothing, housing and medical care. The Court in *Goldberg* held that while a hearing was required, it need *not* take the form of a judicial or quasi-judicial trial. However, the *Goldberg* Court did require that the recipient be given the opportunity to *orally* present his own evidence and arguments and to confront adverse witnesses. The procedural requirements in *Goldberg* were a direct result of the significant property interest at stake and the devastating impact which the loss of welfare benefits would have on the recipient. As noted earlier, the petitioner's interest in this case is much more limited and the impact of non-renewal of staff privileges was minimal.

The final two cases which petitioner cites, *Morrissey v. Brewer*, 408 U.S. 571 (1972), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), are clearly distinguishable from the present case. There is no conflict between the principles enunciated in those cases and the decision of the court of appeals in this case.

Morrissey was a habeas corpus proceeding arising out of a parole revocation. No hearing had been held in *Morrissey* before the plaintiff's parole was revoked and he was reincarcerated. This Court recognized the paramount interest in avoiding a termination of liberty and examined what process was required prior to revocation of parole. However, this Court also recognized that the overall concept of due process of law is a flexible one, and therefore, the type of procedural protections required in a particular situation depends upon the circumstances of that situation. 408 U.S. at 481. *Morrissey* did not hold, or even suggest, that in the present context the petitioner must be afforded an opportunity to call witnesses.

Similarly, *Wolff* involved a prison disciplinary proceeding. That proceeding substantially affected a prisoner's liberty interest by imposing a loss of good-time credits, which otherwise would have shortened the prisoner's incarceration. This Court again recognized that the circumstances of each situation must be examined to determine the procedural protections required. *Wolff* does not suggest that the present circumstances require that petitioner be allowed to call witnesses.

This Court has been careful to note that the type of proceeding in question is a critical factor in determining what procedures are required. By way of example, in *Board of Curators, Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978), this Court specifically drew the distinction between disciplinary proceedings and evaluations of academic suitability.

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-

> hearing requirement. . . . The decision to dismiss respondent . . . rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor . . . Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.

Id., at 89-90. Thus, this Court held that merely informing the student of problems which could result in dismissal, and a careful and deliberate decision regarding the dismissal meet minimal due process requirements in the academic dismissal situation. *Id.* at 85.

The present case involves a peer review proceeding. The review of petitioner's application for hospital staff privileges was an evaluation of cumulative information which resulted in a medical judgment of hospital officials that petitioner did not have the ability to perform adequately as a member of the medical staff of University Hospitals. Thus, this case is much more analagous to the facts of *Horowitz* than to the facts of *Morrissey* or *Wolff*. The extensive due process protections which were given the petitioner, *i.e.*, written notice, opportunity for confrontation and cross-examination of witnesses, and an opportunity to orally argue his own case, adequately meet the due process requirements which this Court has found appropriate in its prior cases.

3. Petition Should Be Denied Based Upon Lower Courts' Factual Finding That Petitioner Was Not Refused Right To Present Witnesses

The lower courts specifically held that petitioner never requested permission to call his own witnesses and that there was no outright refusal by respondents to allow petitioner to call witnesses. Petitioner, however, continues to mischaracterize what occurred before the MSAC in an effort to gain the review of this Court.

The record is clear that petitioner was willing to allow the MSAC to review his application without the benefit of any witnesses. When he learned that the MSAC would be presented with live testimony, the petitioner never asked to call his own witnesses or to postpone the proceeding. Thus, the record before the lower courts revealed that the MSAC never denied petitioner the right to call additional witnesses. This factual finding presents a sufficient reason for this Court to deny the petition.[3] *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

4. This Court Has Not Held That Reasons For A Decision And Evidence Relied Upon Must Be Specified Each Time A Property Interest Is Affected

Petitioner's reliance upon *Wolff v. McDonnell, supra*, and *Morrissey v. Brewer, supra*, in support of his position that respondents were required to render a written or oral decision specifying both the reasons for the decision and

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[3]Petitioner argues that this finding by both the lower courts is "clearly incorrect and misleading". The petitioner fails to cite to any place in the record where he specifically asked to call additional witnesses or asked for a continuance of the proceedings. Rather, petitioner wants this Court to presume that he would not have been afforded an opportunity to call witnesses if he had asked permission to do so.

the evidence supporting that decision is in error. As noted earlier, *Wolff* and *Morrissey* both involve loss of liberty due to incarceration. Accordingly, this Court recognized in those cases that while the full panoply of procedural protection was not mandated in those cases, the circumstances of parole revocation and prison disciplinary proceedings require formal written decisions. Those cases, however, do not hold that written or oral reasons for a decision are constitutionally mandated whenever property interests are affected by state action.

Clearly, a written decision is not constitutionally mandated in all proceedings. By way of example, juries, when they render general verdicts, do not explain the basis of the verdict. Also, when federal district judges dispose of a case without a trial, as in granting a motion to dismiss, Fed. R. Civ. P. 52 (a) excuses them from having to issue findings and conclusions.

The present case is clearly distinguishable from *Wolff* and *Morrissey*. The property interest which petitioner asserts in this case differs significantly from the liberty interests which this Court sought to protect in *Wolff* and *Morrissey*. That difference, standing alone, is sufficient to show the lack of conflict between the court of appeal's decision below and the prior decisions of this Court.

The procedural context of this case also differs from the circumstances in *Wolff* and *Morrissey*. In the instant case, the MSAC was performing a subjective peer evaluation to determine whether petitioner's application for staff privileges should be approved. *Wolff* and *Morrissey*, on the other hand, involved fact finding by quasi-judicial bodies in disciplinary type actions to determine if specific laws or regulations had been broken.

Moreover, several safeguards existed in this case which make a formal written decision unnecessary. First, the petitioner had been provided with a written list of reasons upon which Dr. Carey had based his refusal to recommend reappointment. This list was the basis for the MSAC hearing. Second, a 377 page transcript of the full proceedings before the MSAC was prepared by a court reporter, and documentary evidence was also part of the record.

After reviewing that transcript, both the district court and the court of appeals determined that the MSAC had only been presented with matters which were reasonably related to the operation of the hospital. The matters presented were the reasons which Dr. Carey had advanced as the basis for his refusal, as petitioner's supervisor, to recommend reappointment. The evidence presented to the MSAC showed petitioner was uncooperative, disruptive and that he had engaged in numerous unprofessional improprieties. At the time the MSAC voted to reject petitioner's application, there was nothing in the record before it which was not rationally related to the operation of University Hospitals.[4]

The duty to explain presupposes that the explanation is not obvious, where it is a statement of reasons is not required. An explanation of the basis for a decision is unnecessary where, as here, the reason may be fairly inferred from the transcript of the hearing.

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[4]Petitioner alleges that a statement of the reasons for the MSAC decision is necessary since there was no evidence presented on six charges. This is a bald misstatement of the facts. The district court noted that for the few charges on which witnesses did not appear, there was documentary evidence. This evidence was reviewed by both lower courts.

The numerous written charges reviewed by the MSAC and the fully documented proceedings before the MSAC constituted an adequate record to permit an effective review. The lower courts did not have to engage in speculation, as suggested in petitioner's brief, to find a sufficient and rational basis for the MSAC's decision. Accordingly, the petitioner has failed to set forth any circumstances which would indicate a conflict with this Court's prior decisions.

B. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

The three appellate decisions which petitioner claims are in conflict with the Sixth Circuit's decision in this case do *not* hold that procedural due process requires that a physician be afforded the right to call witnesses on his own behalf. Petitioner's brief inexcusably misstates the actual holdings of those cases.

In *Lew v. Kona Hosp.*, 754 F.2d 1420 (9th Cir. 1985), a physician's staff privileges were terminated after the physician was given notice, a written statement of charges against him, and a hearing, wherein he was represented by counsel and allowed to call and cross-examine witnesses. The Ninth Circuit Court of Appeals held that under the existing circumstances, the physician "received more than the minimum requirements of due process." *Id.* at 1425. The court of appeals did *not* hold that minimum requirements of due process mandate that a physician has the right to call witnesses.

The second case relied upon by petitioner, *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974), did not even consider the issue of whether a

physician must be afforded the right to call witnesses at a hearing to determine termination of staff privileges. The only issue addressed in *Duffield* was the physician's claim that the district court had improperly denied his motion to amend the complaint to allege the disqualification of the committee which made the determination to revoke staff privileges. The Fourth Circuit Court of Appeals stated: "It is this claim of disqualification which is the single complaint of the appellant to be resolved on this appeal." *Id.* at 515. While the physician had been allowed to call witnesses at the termination hearing, the court of appeals did *not* hold that this was a due process requirement.

Finally, *Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc.*, 496 F.2d 174 (4th Cir. 1974), does not hold that minimum due process requires that a doctor have the right to call witnesses on his own behalf. In *Christhilf*, a physician at a hearing to determine staff privileges was only allowed to admit or deny thirty-two prior incidents. He was not allowed to discuss the merits of those incidents. The Fourth Circuit Court of Appeals stated: "The fundamental question is whether the board denied [the physician] due process by ruling . . . that although it would consider the 32 infractions of the rules, it would not go back into those cases and determine whether or not they were proper or improper." *Id.* at 178.

The court of appeals held that the physician must be given an opportunity to be heard on those incidents which had not been the subject of previous hearings. In setting forth what minimum due process required, the court of appeals stated:

> Administrative proceedings of this nature need not be conducted as full-blown trials . . . At the very least the

> board should have considered, along with the documentary evidence of the incidents, the doctor's explanation in justification or mitigation of charges of wrong-doing that have never previously been the subject of a board hearing.

Id. at 179. Thus, the court of appeals felt that minimum due process requirements would have been satisfied if the board had simply allowed the doctor to give an oral explanation of these incidents. In the present case, petitioner was given a much more extensive opportunity to be heard.

Petitioner's contention that the decision of the court of appeals below is in conflict with the above-mentioned decisions is incorrect. Those cases simply indicate that a physician should have some opportunity to be heard and they do not address the issue advanced by petitioner in this action.

C. THE DECISION BELOW DOES NOT DECIDE AN IMPORTANT, BUT PREVIOUSLY UNSETTLED QUESTION OF FEDERAL LAW

The applicability of principles of administrative res judicata in this case is a question of state law. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984). Petitioner, in an attempt to bring this case under the provisions of Sup. Ct. R. 17.1(c), misleadingly implies that this issue is a question of federal law. Citing only federal case law, the petitioner urges this Court to decide the scope of the principle of res judicata which the State of Ohio should accord to decisions from its administrative bodies. This issue is one which is properly determined by reference to state law, as specifically noted by the district court.

In fact, the Supreme Court of Ohio has dealt with the related principles of res judicata and collateral estoppel, and those doctrines of preclusion are part of the substantive law of the State of Ohio. *See, e.g., Norwood v. McDonald*, 142 Ohio St. 299 (1943); *Trautwein v. Sorgenfrei*, 58 Ohio St.2d 493 (1979); *Hicks v. De La Cruz*, 52 Ohio St.2d 71 (1977). The district court in the present case specifically noted that its conclusion that the doctrine of res judicata did not preclude the MSAC from hearing certain charges was in accord with the law of the State of Ohio. Thus, this issue involves a matter of state substantive law and does not raise an issue of federal law for review by this Court.

Moreover, the facts of this case show that the courts of Ohio would not apply the legal principle of res judicata. First, there was no adequate opportunity to litigate the prior charges of misconduct made against petitioner. Second, the precise issue at the MSAC hearing had never been the subject of prior peer review proceedings. Finally, some of the charges brought against the petitioner were new and had never been the subject of any administrative proceeding. These factual determinations preclude an application of the doctrine of res judicata under Ohio law.

It is clear that the court of appeals did not decide an important question of federal law which had not been settled by this Court when it considered the application of the principle of res judicata. It is also clear that the factual circumstances of this case make the doctrine of res judicata inapplicable. Accordingly, this Court should not grant the petition for a writ of certiorari in order to determine this question of state law.

D. THE DECISION BELOW DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

In a desperate attempt to continue this litigation, petitioner restates his prior positions and argues that this Court should invoke its power of supervision over the lower federal courts. As respondents have previously argued, the lower federal courts correctly reviewed this case and determined that petitioner was given adequate due process protections. When petitioner's rhetorical patina is stripped away, this case is reduced to a simple determination by the MSAC, after giving petitioner an extensive opportunity to be heard, that petitioner's application should be denied based on the evidence that petitioner was dishonest, unethical, uncooperative and a very disruptive member of the medical staff, who on several occasions had even jeopardized patient care.

The lower courts carefully reviewed the procedural rights accorded petitioner, the complete transcript and the documentary evidence. The lower courts properly concluded that petitioner had been given at least the minimum rights required by due process. Nothing in the record of this case indicates that the lower courts departed from the accepted and usual course of judicial proceedings. Accordingly, this Court should not invoke its power of supervision over the lower federal courts as a basis for granting the petition for a writ of certiorari.

CONCLUSION

Petitioner has failed to show any conflict between the decision of the Sixth Circuit Court of Appeals and prior decisions of this Court or of other courts of appeals. Petitioner has also failed to show any other basis for this Court to hear this case. Accordingly, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Elam, a member of the Bar of this Court and counsel for respondents herein, hereby certify that on the 10th day of May, 1988, three copies of the Brief Opposing the Petition for Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit were served, postage prepaid, upon Thomas A. Young, Esq., Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215.

JOHN C. ELAM

APPENDIX

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Federal Rule Of Civil Procedure 52(a)

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

U.S. Supreme Court Rule 17.1(c)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

* * *

(c) When a state court or a federal court of appeals has decided an important question of federal

law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.